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Supreme Court of the United States

OCTOBER TERM, 1947

No. 470

WILLIAM CLARK,

Petitioner,

against

THE UNITED STATES.

PETITIONER'S REPLY BRIEF

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Jurisdiction

The jurisdiction of this court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

Argument

If the defendant's brief proves nothing else, it establishes conclusively that there are important and heretofore undecided questions in this case which should be settled by this court.

1. The defendant refuses to take sides either for or against the doctrine enunciated in the court below that a federal judge's continuance in office, in the absence of impeachment and conviction, "is subject wholly and alone to the untrammelled will of the judge" (R. 22). The reluc-

tance of the defendant to do so is undoubtedly dictated by the realization that, on this record, the manifestation of the "untrammelled will" of this petitioner is so clear and unmistakable (see the evidence summarized at pp. 27-28 of the petition) that the judgment below cannot be justified.

There can be no question that the rejection by the President of petitioner's resignation on March 24, 1942, would have rested there had it not been for the Attorney General's mistaken advice to the President thereafter that the petitioner had "automatically" vacated his judicial office (R. 15).[1] The Attorney General having rendered this erroneous advice, the President on March 26, 1942, wrote to the petitioner stating:

> "Since talking to you the other day, I have been advised that under the law your voluntary entry into the military service will not permit the retention of your commission as United States Circuit Judge.

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[1] The suggestion made by the defendant (Br. p. 9) and by the court below (R. 23) that there was no withdrawal and therefore the resignation was still pending when it was accepted by the President two days later, completely ignores the testimony of the petitioner (R. 34):

> "32Q. During that interview, did you at any time state to President Roosevelt, either directly or indirectly, that you wanted him to or were willing to have the offer of resignation stand open after he rejected it?
>
> A. I never even had that idea, as a matter of fact.
>
> 33Q. Was anything like that said by you?
>
> A. No.
>
> 34Q. Did the President say to you in words or effect, anything suggesting or asking that he be permitted to treat this offer as an open offer of resignation to be accepted later on if he chose?
>
> A. He did not."

Furthermore, a requirement that the resignation be withdrawn places an unwarranted emphasis upon a formal act which would have been absurd in the friendly, informal atmosphere of the conference between these two people (see R. 34).

> Under the circumstances I must regretfully accept your resignation from the judicial post" (R. 11).

The pivotal point of the President's letter, otherwise inexplicable in the light of his previous rejection of the petitioner's resignation, was the advice of his Attorney General that petitioner's office had been "automatically" vacated.

It is not surprising therefore to find that the petitioner's letter of protest to the President dated April 2, 1942 (R. 12-13) was concerned primarily with a discussion of whether or not his "voluntary entry into the military service" would or would not permit the retention of his judicial office.

If the President, on March 24, 1942, indeed "neither finally accepted nor rejected petitioner's resignation" and did not "finally decide whether petitioner should resign or go on leave of absence * * *" as the defendant now contends (Br. p. 5) and as the court below incorrectly found (R. 10), what rational explanation can be advanced for the finding by the court below that, on that day,

> "At 11:50 A. M., E.W.T. Mr. Early told the Press that the President asked the plaintiff to go on a leave of absence, instead of resigning from the Bench" (R. 11).

And if the President on March 24, 1942, had not unequivocally rejected petitioner's resignation, what rational explanation can there be for petitioner's subsequent letter to the President dated April 2, 1942 (R. 12) where, referring to the resignation which he had proffered, he stated:

> "You very generously rejected it and I think I am safe in saying that action on your part met with universal approval."

Furthermore, when the President answered this letter, he did not challenge the flat assertion that he had rejected the petitioner's resignation (R. 13).[2]

The defendant's misconception of the issues relating to petitioner's proffered resignation and the failure of the court below to see this issue in its proper perspective, stem from a stubborn refusal to face the fact that the President's conduct *after* the interview of March 24, 1942, was motivated solely by the belief that the petitioner had "automatically" vacated his office as a matter of law and as a matter of course whether he formally resigned or not.

Under these circumstances how can it be held, as the court below did, that the petitioner, in the exercise of his "untrammelled will" had resigned or, as the defendant now claims (Br. p. 12), that the petitioner's "conduct in 1942 and thereafter is conclusive of his intention to abandon his judicial post for military service"?

The petitioner, from the first letter which he addressed to the President on the subject, under date of January 30, 1942, in which he spoke of a leave of absence from the court (R. 7) to the letter which he addressed to Judge Biggs on April 14, 1943 (R. 37) and including all conferences and correspondence with the President intermediate to those two dates (R. 33-4, 37, 12, 14) manifested, not an intent to abandon his judicial office, but a definite intent to hold it, expressed in his stated refusal "to be forced out, so to speak, on the doubtful interpretation of a statute" (R. 13).

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[2] The defendant refers to the President's statement to the petitioner, on March 24, 1942, when advised that five circuit judges in the Third Circuit were unnecessary: "If that is so, I will refuse your resignation" (R. 34) as a "statement, conditional on its face" which "conveyed an unmistakable intention to keep the matter of resignation open" (Br., p. 10). This conclusion, based upon a misconstruction of a part of the evidence, is completely refuted by the President's subsequent statement to his secretary, Mr. Early: "Steve, this is Judge Clark, he is just offering his resignation to go into the army. I have rejected it. * * *" (R. 34) which was followed by Mr. Early's announcement to the Press that the President had asked petitioner to go on leave of absence instead of resigning from the Bench (R. 11).

As evidence of petitioner's "intention to abandon his judicial post for military service * * *" (Br. p. 12) defendant refers to his knowledge of the "legal uncertainty" of his status created by Title 5 U. S. C. § 62 (Br. p. 13). It is a little difficult to understand what bearing knowledge of "legal uncertainty" could have in determining the petitioner's intention. Furthermore, the petitioner's letter to the President dated April 2, 1942 (R. 12) clearly indicates that there was no uncertainty at all in the petitioner's mind about his legal status. He pointed out to the President that he was "quite familiar with the statute on which the Attorney General has advised you". He continued: "It was intended to prevent the receipt of two salaries". He then pointed out: "Only by a strained construction can it be extending to what is known as 'incompatible office-holding'". He then indicated that even that "strained construction" would probably be taken care of by a proposed amendment. If the petitioner had any feeling at all about Title 5 U. S. C., § 62, it was that only by a "strained construction" of the Act would he be declared ineligible to hold judicial office. The facts demonstrate, as we have said once before, not an intent to abandon his office, but a clear intent, expressed in this very letter, "not to be forced out, so to speak, on the doubtful interpretation of a statute" (R. 13).

2. The defendant's argument that, so far as a federal officer is concerned, there is no judicial remedy for the enforcement of the reemployment provisions of Section 8 of the Selective Training and Service Act of 1940 (Br. p. 17), raises another important issue for this court to decide.

The jurisdiction of the Court of Claims to determine whether a judge, or other officer of the United States, is entitled to the salary of his office, has been recognized by this court in a long line of cases. (*McAllister* v. *United States,* 141 U. S. 174; *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 311; *Wallace* v. *United States,* 257 U. S. 541; *Myers* v. *United States,* 272

U. S. 52; *Humphrey's Executor* [*Rathbun*] v. *United States*, 295 U. S. 602.)

Since the Court of Claims was, and is, available to a federal judge and to any federal officer or employee who sues for the salary attached to his office, it was not necessary for Congress to provide additional judicial remedies—a situation which was not true of suits brought by a veteran against a private employer.

To follow the defendant's reasoning compels the conclusion that Congress intended to practice a fraud on those in the employ of the United States government when it provided, on the one hand, that their return to office was mandatory and, on the other hand, failed to provide for any remedy against the government. The only interpretation of this statute consistent with fair dealing—and we prefer to assume an intent to deal fairly with the veteran—is that when Congress provided that the veteran, upon restoration, shall be deemed to have been on furlough or leave of absence, the office was never vacated, and since the office was never vacated, a suit for salary in the Court of Claims is the proper remedy and no further remedies were necessary.

The principle enunciated by this court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, that an employee on furlough or leave of absence under Section 8 of the Selective Training and Service Act of 1940 has a "continuing relationship with the employer" and our contention that a claim against the United States under Section 8 may be enforced in the Court of Claims, were both expressly recognized by that court in the recently decided case of *Kephart* v. *The United States* (No. 47363, Dec. 1, 1947).[3] The holding in the *Kephart* case is in direct conflict with

[3] As an appendix to this brief, we have annexed a copy of a brief submitted by the Government to the Court of Claims in the *Kephart* case on a motion for a new trial. The Government's brief refers to the "importance" of the question involved and the irreconcilability of the *Kephart* and the *Clark* decisions.

the holding of the same court in the case at bar since here the court refused to give any effect to Section 8, indicating that it "was intended to be no more than a command to government agencies to restore the employee to his former position, but was not intended thereby to give rise to any cause of action against the United States Government for a failure to comply with it" (R. 29). Whether the federal government shall be held to as strict a standard of morality in the courts as a private employer must adhere to in dealing with a returned veteran, is an important and heretofore undecided question which should be settled by this court. It is a question which even the Court of Claims does not seem to be able to answer with consistency.

Respectfully submitted,

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HAROLD W. WOLFRAM,
of Counsel.

APPENDIX

Brief recently submitted by the Government in support of its motion in the Court of Claims for a new trial in the case of Kephart v. *The United States:*

IN THE

COURT OF CLAIMS

OF THE UNITED STATES.

CALVIN I. KEPHART, Plaintiff, v. THE UNITED STATES, Defendant.	No. 47363

DEFENDANT'S MOTION FOR A NEW TRIAL AND BRIEF IN SUPPORT THEREOF

Now comes the defendant, by its Acting Assistant Attorney General, and moves the Court to grant a new trial herein, and assigns as reasons therefor the following errors of law:

ERRORS OF LAW

The Court erred:

1. In not holding that, as a Federal Government employee, plaintiff has no right to sue the United States for benefits to which he was allegedly entitled under Public Resolution No. 96, approved August 27, 1940, as amended by the Selective Training and Service Act of 1940.

2. In deciding that plaintiff was entitled to recover.

BRIEF

THIS COURT HAS NO JURISDICTION TO DETERMINE CLAIMS OF GOVERNMENT EMPLOYEES BASED ON PUBLIC RESOLUTION No. 96, APPROVED AUGUST 27, 1940, AS AMENDED BY THE SELECTIVE TRAINING AND SERVICE ACT OF 1940.[1]

On March 26, 1947, the Circuit Court of Appeals, First Circuit, in *Insular Police Commission* v. *Lopez*, 160 F. (2d) 673, *cert. den.* 67 S. Ct. 1730, held that Congress did not grant to Federal Government employees any judicially enforceable rights growing out of the veterans acts upon which plaintiff herein relies. The Court pointed out that employees in private employment were given such rights by such acts, but that, with respect to rights which the Government creates in individuals against itself:

> "It may limit the individual to administrative remedies. * * * So far as we can find the legislative history of the Selective Training and Service Act is barren of any intimation that the Congress contemplated any judicial enforcement of the rights conferred as against the Government of the United States * * *" (at p. 676).

Shortly thereafter, on July 7, 1947, this Court, citing the *Lopez* case, similarly so held in *Clark* v. *United States*, No. 47009:

> "Congress differentiated between employees of the United States Government and people in the employ of a private employer and people in the employ of a State or political subdivision thereof; only in the case of a person in the employ of a private employer was any remedy expressly given in the courts for a violation of the provisions of the Act" (Op. p. 22).

Thus, the Court's decision herein allowing recovery, which allowance was expressly stated to be based solely on

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[1] This point was heretofore raised in defendant's brief (R. 68-71). However, because the Court in its opinion of December 1, 1947, failed to even mention it, and because the question involved is deemed of such importance, it is being raised again to make certain that the Court did not by chance inadvertently overlook it.

> "the acts of Congress relating to military service before and during World War II * * * as the court is of the opinion that plaintiff's case is controlled by those acts" (Op. p. 6).

is clearly in direct conflict with those in the *Lopez* and *Clark* cases.

Any attempted distinction based on the fact that in the *Lopez* and *Clark* cases the plaintiffs were not restored at all, while here there was restoration but not at the correct level, must fail. Both of these circumstances, as well as such other employment relationships as demotions, are covered by the Act. *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 326 U. S. 275; *Trailmobile Co.* v. *Whirls*, U. S. S. Ct. October Term, 1946, No. 85, decided April 14, 1947. Clearly, if the courts have no jurisdiction to render judgment for all of the salary claimed to be due and owing by reason of non-compliance with the Act, they likewise have no jurisdiction to render judgment for any part thereof.

Conclusion

The decision of the Court in this case cannot be reconciled with the Court's decision of last July in the *Clark* case or with that of the Circuit Court of Appeals, First Circuit, in the *Lopez* case, which the Supreme Court refused to review. The *Clark* and *Lopez* cases appear to be entirely sound and wholly in keeping with the legislative intent. It is, accordingly, respectfully requested that this motion for a new trial be granted and that the petition be dismissed.

Respectfully submitted,

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